Liu Thian Leong v Jee Nyen Chong (sued in his personal capacity and as an office-bearer of the Jawatankuasa Dewan Siburan (Siburan Hall Committee) under the provision of s 9(c) of the Societies Act 1966) & Ors and other suits

HIGH COURT (KUCHING) — SUIT NOS 22–228 OF 2010, 22–229 OF 2010 AND 22–230 OF 2010
RHODZARIAH BUJANG J
7 JANUARY 2013

Tort — Defamation — Libel — Whether impugned words defamed plaintiffs — Whether defence of qualified privilege and fair comment succeeded — Whether defendants crossed bounds of proper reply when they made counter charges and fresh imputations

Villagers of Siburan on the outskirts of Kuching formed a village hall committee which was registered as a society and came to have its own building with a multi-purpose hall and basketball court. Some of villagers were unhappy with the way affairs were run by the society's executive committee ('EC'). They complained, for example, that applications to become members of the society were subject to the EC's absolute discretion and that instead of having an open policy of allowing the hall to be used by any interested party on payment of rental the EC was parochial and discriminatory. When the applications of 50 persons, including the three plaintiffs, to become members of the society were rejected by the EC without reason, the plaintiffs called a press conference to air their frustrations. Their comments were widely reported in the Chinese newspapers. In response, the EC issued a rebuttal press statement ('the notification') drafted by the society's secretary explaining that the statements made by the plaintiffs were 'misleading and had caused misunderstanding and created dissatisfaction and hatred amongst the people in the village and damaged the reputation of the EC'. The notification so outraged the plaintiffs, who were prominent members in society, that they each filed separate actions for libel against the society's chairman, secretary and treasurer (the first, second and third defendants respectively). They were sued both in their personal capacities and as office-bearers of the society. The defendants denied the words in the notification were defamatory of the plaintiffs and raised the defences of qualified privilege and fair comment. The defendants also contended that they should not have been sued in their personal capacities as the issuance of the press statement was a collective decision of the EC. The claims of the plaintiffs were jointly tried.

Held, allowing the claims and awarding the first plaintiff RM60,000 and the second and third plaintiffs RM40,000 each in damages:

(1) The words in the notification were defamatory of the plaintiffs because a reasonable reader of it would conclude that the plaintiffs were rebel rousers intent on inciting feelings of ill-will and dissension amongst the people of Siburan against the EC. Such an accusation tended to lower them in the estimation of right-thinking members of society particularly those from Siburan village (see para 25).

(2) In responding to the plaintiffs' press statement the question was whether the defendants had transgressed the realm of a proper reply by making 'counter charges or unnecessary imputation'. Instead of just explaining that the membership application forms were improper, the defendants accused the plaintiffs of causing misunderstanding and creating dissatisfaction and hatred amongst the villagers of Siburan. The negative imputations of such a statement on the plaintiffs were wholly unnecessary and irrelevant (see paras 32–34).

(3) The defendants failed both on the defence of qualified privilege as well as fair comment. They were, however, not personally liable for the defamatory statement in the notification as right from the start the decision to publish it was a joint decision of the EC (see paras 50 & 64).

[Bahasa Malaysia summary

Penduduk-penduduk kampung Siburan di pinggir bandar Kuching menubuhkan ahli jawatankuasa dewan kampung yang didaftarkan sebagai persatuan dan mempunyai bangunannya sendiri dengan dewan serbaguna dan gelanggang bola keranjang. Beberapa penduduk kampung tidak berpuashati dengan cara urusan yang dikendalikan oleh ahli jawatankuasa eksekutif persatuan ('JE'). Mereka membuat aduan, contohnya, permohonan-permohonan untuk menjadi ahli persatuan adalah tertakluk kepada budi bicara mutlak JE dan sebaliknya mempunyai polisi terbuka dengan membenarkan dewan digunakan oleh mana-mana pihak yang berminat atas bayaran sewa, JE adalah berfikiran sempit dan bersifat diskriminasi. Apabila permohonan 50 orang, termasuk ketiga-tiga plaintif, untuk menjadi ahli persatuan ditolak oleh JE tanpa sebab, plaintif-plaintif memanggil sidang akhbar untuk mengutarakan kekecewaan mereka. Aduan mereka dilaporkan secara meluas oleh akhbar-akhbar China. Dalam menjawab, JE mengeluarkan pernyataan akhbar pematahan ('pemberitahuan') yang didraf oleh setiausaha persatuan yang menjelaskan bahawa pernyataan-pernyataan yang dibuat oleh plaintif-plaintif adalah 'misleading and had caused misunderstanding and created dissatisfaction and hatred amongst the people in the village and damaged the reputation of the EC'. Pemberitahuan tersebut menaikkan rasa marah plaintif-plaintif, yang mana adalah orang terkenal dalam masyarakat, bahawa setiap mereka memfailkan

tindakan berasingan untuk libel terhadap pengerusi persatuan, setiausaha dan bendahari (masing-masing adalah defendan-defendan pertama, kedua dan ketiga). Mereka disaman dalam kedua-dua kapasiti mereka iaitu peribadi dan sebagai pemegang jawatan persatuan. Defendan-defendan menafikan perkataan-perkataan di dalam pemberitahuan tersebut adalah fitnah terhadap plaintif-plaintif dan membangkitkan kepentingan bersyarat dan komen yang wajar. Defendan-defendan juga berhujah bahawa mereka tidak patut disaman dalam kapasiti peribadi memandangkan terbitan pernyataan akhbar tersebut adalah keputusan kolektif JE. Tuntutan-tuntutan plaintif-plaintif adalah adalah perbicaraan bersama.

Diputuskan, membenarkan tuntutan-tuntutan dan mengawardkan plaintif pertama RM60,000 dan plaintif kedua dan ketiga RM40,000 setiap seorang dalam ganti rugi:

(1) Perkataan-perkataan dalam pemberitahuan adalah fitnah terhadap plaintif-plaintif kerana pembaca yang munasabah akan menyimpulkan bahawa plaintif-plaintif adalah pemberontak berniat untuk menghasut perasaan marah dan perselisihan di antara penduduk-penduduk Siburan terhadap JE. Dakwaan sedemikian membuatkan mereka dipandang rendah oleh ahli-ahli masyarakat yang berfikiran wajar terutamanya mereka yang tinggal di kampung Siburan (lihat perenggan 25).

(2) Dalam menjawab pernyataan akhbar plaintif-plaintif persoalan adalah sama ada defendan-defendan telah melanggar sifat jawapan betul dengan membuat 'counter charges or unnecessary imputation'. Sepatutnya defendan-defendan hanya perlu memberikan penjelasan bahawa permohonan untuk keahlian adalah tidak betul tetapi mendakwa plaintif-plaintif menyebabkan salah faham dan menimbulkan rasa tidak puas hati dan kebencian di antara penduduk-penduduk Siburan. Tohmahan negatif pernyataan sedemikian ke atas plaintif-plaintif adalah secara keseluruhannya tidak perlu dan tidak relevan (lihat perenggan 32–34).

(3) Defendan-defendan gagal dalam kedua-dua pembelaan kepentingan bersyarat dan juga komen yang wajar. Mereka walau bagaimanapun, tidak secara peribadi bertanggungjawab untuk pernyataan fitnah di dalam pemberitahuan kerana sejak daripada permulaan keputusan untuk menerbitkannya adalah keputusan bersama JE (lihat perenggan 50 & 64).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 484–645.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142b, FC (folld)

Albert Cheng & Lam Yuk Wah v Tse Wai Chun Paul [2000] 3 HKCCFAR 339 (refd)
Choo Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)
Cohen v Daily Telegraph Ltd [1968] 2 All ER 407, CA (refd)
DP Vijandran v Karpal Singh & Ors [2000] 3 MLJ 22, HC (refd)
Dwyer v Esmonde (1877) IR 11 CLS 542 (refd)
Harbour Radio Pty Limited v Trad [2012] HCA 44, HC (refd)
Henry Wong v John Lee & Anor [1980] 2 MLJ 254, HC (refd)
JB Jeyaretnam v Goh Chok Tong [1985] 1 MLJ 334 (refd)
Joseph v Spiller [2010] 3 WLR 1791, SC (refd)
Joynt v Cycle Trade Publishing Co [1904] 2 KB 292, CA (refd)
Kemsley v Foot [1952] AC 345, HL (refd)
Ling Kiong Tieng @ Ling Hie Sing v Wong Lieng Kiong & Ors [2010] MLJU 1445; [2010] 1 LNS 1759, HC (folld)
Loveday v Sun Newspapers (1938) 59 CLR 503, HC (refd)
Penton v Caldwell (1945) 70 CLR 219, HC (refd)
Reynolds v Times Newspapers Ltd and others [2001] 2 AC 127, HL (refd)
Sarawak Time Ltd & Ors v Tan Too Yam [1960–1963] SCR 221, CA (refd)
Syed Husin Ali v Sharikat Perchtakan Utusan Malayu Bhd and Anor [1973] 2 MLJ 56 (refd)
Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)
Turner (otherwise Robertson) v Metro-Goldwyn-Mayer Pictures Ltd [1950] 1 All ER 449, HL (refd)
Watt v Longsdon [1930] 1 KB 130, CA (refd)

Legislation referred to

Defamation Act 1957 s 12(3)
Evidence Act 1950 s 134
Societies Act 1966 s 9(c)

Chong Siew Chiang (Chong Brothers) for the plaintiff.
Henry Ling (Ling & Wong) for the defendants.

Rhodzariah Bujang J:

[1] Half a century ago, Siburan was just a village laying at the outskirts of Kuching but it is now a thriving town with a predominantly Chinese population. Almost that many years ago, its villagers realised their good intention to set up an association, appropriately named as Siburan Village Hall

Committee ('the society') which was registered with the registrar of societies in 1973. In its rules and regulations, the objectives of the society are stated as follows:

(a) To collect sums of money and fund by way of contributions, sub-scriptions, donations, legacies, grants and any other lawful methods for the purposes of purchasing or leasing land and building thereon a Village Hall and such other necessary buildings as may be appropriate for the use of such Hall or buildings by the community in Siburan Village.

(b) To provide and to maintain the Village Hall or buildings for the holding of exhibitions, meetings, gatherings, lectures classes and indoor games.

(c) To provide for the benefit of the inhabitants of Siburan Village and its neighbourhood without distinction of sex, of political or of creed or race, goodwill in the form of social intercourse/gatherings and friendly competition through indoor games.

(d) To encourage the residents of Siburan Village to take an active interest in the civic, physical and moral welfare of the community.

(e) To maintain and manage, or to co-operate with any local statutory authority in the maintenance and management of such a hall for activities promoted by the Society of the above objects.

(f) To do all such lawful acts or things as are incidental or conducive to the attainment of the above objects or any of them.

[2] It is further stated in the rules (r 3(a)) that the membership to the society is open to any persons from 'Siburan Village or any neighbouring villagers, who is interested in the objectives of the Society irrespective of race, sex, religion or political affiliation'. But there are requirements for admission, the first of which is that such an application must be proposed and seconded by two existing members of the society, forwarded to the secretary and secondly, the management board of the society described in the Rules as the 'Executive Committee' has the absolute discretion to 'reject any application without assigning any reason therefore' (r 3(b)). This particular r 3(b) would, as the events unfold in this case, assumed great importance and would be further mentioned in this judgment.

[3] As with any associations, the society's executive committee consists of a chairman, a vice-chairman, an honorary secretary, an assistant honorary secretary, a treasurer, an assistant treasurer and five ordinary members (r 6(a)).

[4] After its registration, the society constructed a three storey building, funded by a government grant and donations from the public. The office of the society is located there and so is the branch office of SUPP (Sarawak United People's Party), a political party which is a member of the ruling coalition,

Barisan Nasional. Annexed to the building is an open multi purpose hall which also doubles as a basketball court. Just like the membership, the hall is open for use, said the executive committee, by the villagers upon application made to them and payment of rental. That was not so, cried certain quarters in the village as from an initial membership of twenty persons, the same has dwindled to only ten in 2010, and worst the executive committee was accused of parachoism and discrimination in the usage of the hall.

[5] Matters came to a head with the death of a young female basketballer by the name of Chong Shien Chien. It was contended by these same quarters that as a result of being unable to use the society's hall for training, she had to travel to another nearby village called Beratok and met with a fatal accident upon her return from training. That incident allegedly sparked an outrage among the villagers, as a result of which the executive committee found themselves staring at a letter of appeal signed by 190 residents demanding that the hall be open up for use of the Siburan villagers and to be admitted as new members of the society. At the initiative of one Dr Jerip Susil who was then and still is at the time of writing this judgment, a member of the state legislative assembly, a dialogue was held on 30 April 2008 between the villagers and the executive committee, then headed by one *penghulu* Boon Jim Lim ('since deceased') regarding the issues raised in the appeal letter. It was agreed at that meeting that a special subcommittee be established to look into, inter alia, the recruitment of new members and to open up the use of the hall. That subcommittee was formed on the same day with one Liu Thian Leong as chairman, Chang Hon Hiung as secretary and Liew Kuet Min as treasurer. Following that meeting a total of 50 applicants submitted, on various dates in May 2008 right up to May 2009 their applications to be members of the society. Amongst the applicants were also Liu Thian Leong, Chong Jit Leong and Chang Hon Hiung. These three prominent sons of Siburan have by their own statements made it good in business and have given their fair share of contributions to the socio-economic and political landscape in Siburan and in the case of Liu Thian Leong, even further than the village. The 50 applications were rejected by the executive committee. The applicants then resubmitted in their applications which were also rejected in early January 2010. They were allegedly told by the executive committee to take back their fees of RM100 each but only some did, the rest did not.

[6] Frustrated with this turn in the event and smarting from the alleged failed promise made by *penghulu* Boon Jim Lim that their applications for membership would definitely be approved, the three named persons above took it upon themselves to champion their cause and that of the other applicants by going to the Chinese press.

THE PRESS CONFERENCE

[7] This was held on 22 July 2010 and received wide coverage in *The*

International Times, *Sin Chew Jit Poh*, *United Daily News* and *See Hua Daily News* in their respective publications on 23 July 2010. In fact, *International Times* and *United Daily News* deemed it fit to run the same story about the frustration of the aspiring members again on 25 July 2010 and 7 August 2010, respectively.

[8] The executive committee did not take all these bad publicity lying down. They met to discuss the matter and came up with a joint decision to issue a rebuttal of their own to the newspaper. It was in the form of a press statement drafted by its secretary, Voon Sam Ted, and titled 'Notification'. *Sin Chew Daily News* published it on 6 August 2010 and *See Hua Daily News* on 7 August 2010. In the said notification they explained that the statements issued by the three named persons were misleading and had caused misunderstanding, created dissatisfaction, hatred amongst the people in the village and damaged the reputation of the executive committee. They explained further that the membership application did not comply with the procedure of the society and did not bear its common seal. They invited the applicants to claim back their refund of RM100 (per applicant) from the executive committee.

[9] The notification so outraged these three named persons that they have each commenced a separate action against the chairman of the society, Jee Nyen Chong, its secretary, Voon Sam Ted and treasurer, Chong Vui Kuet for libel but which actions proceeded as one trial before me.

[10] The defendants have denied the words in the notification were defamatory of the three plaintiffs and also contended that the action should not have been commenced against them personally. The usual defence of qualified privilege and fair comment made without malice upon a matter of public interest were also raised in their statements of defence which were identical in substance, as were the statements of claim of the plaintiffs. So it came to be that the death of the young basketballer had become a catalyst for and given birth to these three actions.

THE DEATH OF THE YOUNG BASKETBALLER

[11] I cannot run away from mentioning this tragic event for almost without exception, all the plaintiffs, the defendants and their witnesses referred to it in their testimonies. The plaintiffs and their witnesses alleged that she had been prevented from practicing at the Hall and this led to the fateful decision to go to Beratok Village to play. But, to the credit of the defendants, her mother and her basketballer friend came to testify at the trial, vehemently denying the allegation of the plaintiffs — the decision to play at Beratok Village was an initial and original plan, not an alternative one. So who do I believe? The mother and her friend of course since they were closest persons to her at that

material time. The plaintiffs and their witnesses were not even known to her personally and what they said about her death, in the face of her mother's and friend's testimonies, came across strongly as rumour mongering at its worst. Therefore, I would have to conclude that indeed that allegation surrounding her death as stated by the plaintiffs at the press conference was false.

THE MEMBERSHIP APPLICATIONS

[12] At the risk of being accused of being morbid, I would again have to mention about another death — that of *penghulu* Boon Jim Lim only because the witnesses at the trial, particularly the plaintiffs, relied so much on the concurrence made by him at that special meeting chaired by YB Jerip Susil on the establishment of the special subcommittee and the assurances he allegedly made that all new membership applications will be accepted by the executive committee. The late *penghulu* would have been the best person to corroborate what transpired at that meeting but I am not so handicapped by his absence because there was a minutes of meeting taken (exh P5B at pp 22–23 of the plaintiff's bundle of document marked as bundle D) which confirmed what actually transpired and what were agreed then as contended by the plaintiff. Further, YB Jerip Susil who testified at the trial, confirmed the said minutes and he was, more importantly, a co-signatory of the minutes.

[13] The defendants, on the other hand had through the evidence of the defendants denied the authority of *penghulu* Boon Jim Lim to represent the executive committee and the society at the said meeting chaired by YB Jerip Susil. In their testimonies in court all pointed out r 3(b) of the society's rule and regulation which I have quoted on the first page of this judgment on the absolute discretion of the executive committee to reject such membership applications without giving reasons.

[14] Jee Nyen Chong ('DW15'), the present chairman of the society and its then secretary, whose name appeared in the list of the special subcommittee's members have denied in cross-examination that he attended the subcommittee meeting as a representative of the executive committee together with the late *penghulu* or that it was even a formal meeting (he said it was just a dinner). However, the minutes of the joint meeting (exh P5B) as confirmed by Dr Jerip Susil and the letter of authorisation to the special subcommittee to recruit new members co-signed by him (exh P7) and the late *penghulu* are to me proof on a balance of probability that there was such a subcommittee authorised by the executive committee.

[15] Jee Nyen Chong also confirmed in cross-examination that he had in his possession RM5,000 in membership fees given at the second subcommittee meeting held on 9 May 2008 which he acknowledged receipt on the last page

of exh P6 (the list of the 50 applicants) and he said RM2,000 had been subsequently returned to the applicants but he still kept RM3,000, shockingly I must say, under his bed. Had there not been such a subcommittee, there would not have been a sudden surge of membership applications and much less, a reason for him to keep the said money.

[16] Though I acknowledge that the executive committee is vested with such absolute power, I could not ignore the fact that the setting up of the special subcommittee with the blessing of the late *penghulu* has created a legitimate expectation in the minds of the aspiring members that their applications would be met with approval. Given the executive committees' inertia over the issue, no one could have faulted the plaintiffs' frustration although venting it to the press is another matter altogether. Whether what they said at the press conference was justified or was fair comment, that would have to be decided in the trial of the counterclaim of the defendants if the plaintiffs failed to overturn the decision of the Court of Appeal which had allowed the appeal against my decision to strike out the said counterclaim (the plaintiffs, it is to be noted, have obtained leave to appeal to the Federal Court against the said decision of the Court of Appeal).

[17] The laying out of these facts would not be complete without me mentioning that the defendants have adduced evidence to show that three out of the 50 named applicants who submitted the forms in fact did not do so. In fact, the defendants' counsel, Mr Henry Ling informed the court earlier that five, not just three of these applicants would come to court to deny that they have made such applications but as I indicated to him after the three have given evidence, two more would just be a question of numbers which would not count too much with me because it is trite law that evidence is to be weighed, and not counted, (see s 134 of the Evidence Act 1950). In the context of this case unless all of the applicants come forward to give the same evidence, it makes not much of a difference if three came and not five. These three applicants testified that they did not sign the said application forms though admitting that their personal details in the forms were correct when cross-examined by Mr Chong Siew Chiang and Mr Alvin Yong who also acted for the plaintiffs. Of course no handwriting experts were called to give evidence on the genuineness of their signatures in the forms. Without the assistance of such expert evidence, I am inclined to think that it is improbable that anyone could obtain their personal particulars and forged their signatures on the forms just for the purpose of bolstering the number of applicants to the society. I take the view therefore that there were indeed these number of applicants who were interested to join the society at that material time.

[18] I have decided to lay out these pertinent background facts in order for a reader of this judgment to better appreciate the issues raised at the conclusion

of the trial and the first issue is the most basic — are the words in the notification defamatory of the plaintiff?

THE DEFAMATORY WORDS

[19] The notification, which translation into English at pp 32 and 34 of bundle D (exhs P10A and P2A, respectively) is quite short and on account of that I have taken the liberty to reproduce it below:

(1) The well-known state Chinese educational and political leaders Liu Thian Leong and Chang Hon Hiung on 23.07.2010 in local presses International Times, Sin Chew Daily, United Daily News and See Hua Daily News as well as Chong Jit Leong on 25.07.2010 in International Times published misleading statements and claimed to take legal action against this Committee within 7 days. It has caused misunderstanding and created dissatisfaction and hatred among villagers of Siburan thereby seriously damaged the reputation of this Committee. If it leads to any serious consequences, Liu Thian Leong etc. should be held fully responsible.

(2) The membership applications submitted by those headed by Liu Thian Leong are not issued by this Committee and do not include its common seal and hence do not comply with the membership application's procedure. Therefore this Committee has decided to reject them after a meeting which also resolved unanimously to refund the entrance fee of RM100.00 each.

(3) This Committee reserves the right to take legal actions against the statements published by Liu Thian Leong, Chang Hon Hiung and Chong Jit Leong.

(4) There are many applicants who have voluntary taken back the refund of RM100.00 each at present. The remaining applicants may claim for refunds at the Committee's Secretarial within two weeks from the date hereof until 19.08.2010.

(5) This Committee is a legal organization and all its activities including administrative and financial matters are executed according to its constitutions and in accordance with the rules of Registrar of Societies. This Committee is responsible to its valid members and the Registrar of Societies and not to Liu Thian Leong, Chang Hon Hiung and Chong Jit Leong nor reporting to them.

[20] Mr Chong Siew Chiang, no stranger to this area of the law, having represented quite a number of litigants in defamation cases and personally being a litigant himself in this kind of cases have put up a 71 pages submission at the close of the trial and devoted ten pages of it on this issue. Mr Henry Ling's written submission in reply is even longer — 121 pages though only about five pages are on this issue alone. I am greatly assisted in the writing of this

judgment by the diligence as well as the well researched and detailed submissions of both counsel and would pause here to record my sincere appreciation to both of them for their effort.

[21] It is indeed an established principle in defamation law that in respect of an action for libel whether the alleged words are defamatory is both a question of law and fact. I am grateful to Mr Chong Siew Chiang for drawing my attention to the Court of Appeal's case of *Choo Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 which lays down a two steps approach in deciding this primary issue which are as follows:

(a) decide, as the first step, whether the words complained of are capable of bearing a defamatory meaning; and

(b) if they are, then only would the court decide if the words are in fact defamatory of the plaintiff.

THE FIRST STEP

[22] Since both Mr Chong Siew Chiang and Mr Henry Ling have cited Richard Malanjum J (as His Lordship then was) in the case of *Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, (of which Mr Chong Siew Chiang acted for the plaintiff), I would be doing justice to both of them by adopting the same case as the starting point of what 'capable' of being defamatory means. His Lordship said, quoting from *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334, that the test is 'whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man, or would tend to lower the plaintiff in the estimation of the right — thinking members of society generally'. His Lordship further cautioned, quoting from *JB Jeyaratnam*'s case again and *Syed Husin Ali v Sharikat Perchtakan Utusan Malayu Bhd and Anor* [1973] 2 MLJ 56, that even if the words did not lower the plaintiff in the estimation of those to whom they were published, they could still be defamatory.

[23] In this regard, I also agree with Mr Henry Ling that the alleged defamatory words must be considered in the context of the whole notification as his statement is backed by a long list of authorities which I do not deem necessary to reproduce here.

[24] When I undertake the exercise as recommended by the case authorities just cited above, the words in their literal, natural and ordinary form can only mean that the plaintiffs have by the alleged misrepresentation and the falsity of their press statements caused the feelings of negativity described in the first paragraph of that notification; the inescapable and reasonable implication

flowing from that statement would be that the plaintiffs were dishonest and irresponsible trouble makers out to sow the seeds of discontent among the villagers towards the executive committee. Thus, in my view the words in the notification are indeed capable of a defamatory meaning described to them by the plaintiffs.

THE SECOND STEP

[25] The said words, I am persuaded to conclude, are indeed defamatory of the plaintiffs because a reasonable reader of the notification would conclude what I have just said above of the plaintiff — that they were, to put it differently, rebel rousers intent on inciting such feelings of ill-will and dissension amongst the good people of Siburan against the executive committee. Such accusation would of course lower them in 'the estimation of the right-thinking members of society', in particular those from Siburan Village.

[26] I will now move to the defences raised by the defendants in this case and they are; as stated earlier:

(a) qualified privilege; and

(b) fair comment.

THE QUALIFIED PRIVILEGE

[27] Mr Henry Ling submitted that the notification was published on an occasion of qualified privilege because it was a reply to an attack mounted by the plaintiffs against his clients, quoting from *Duncan & Neill on Defamation*, (3rd Ed), 2009 at para 16.23 in which it states that a victim of a defamation attack has a legitimate right or interest in defending himself. The learned authors quoted, from *Dwyer v Esmonde* (1877) IR 11 CLS 542 at p 550 that such an aggrieved party having an interest in vindicating his character, has a privilege to publish matter of vindication and defence, and all such matter as is material to the public forming such just and true judgment.

[28] Mr Chong Siew Chiang did not disagree with that statement of the law and submitted that even though the aggrieved party (my description, not his, I must add) is entitled to answer such attack to his character or conduct but in doing so 'he must not bring fresh accusation or condemnation against his adversary'. By way of authority, he has cited *Gatley on Libel and Slander*, (9th Ed), at para 14.63 where it states that a person responding to an attack upon him must not make counter-charges or unnecessary imputations on the private life of the person who has attacked him wholly unconnected with the attack

and irrelevant to the vindication. The privilege, according to the learned author, extends only so far as to enable him to repel the charges brought against him — not to bring fresh accusation against his adversary.

[29] Mr Henry Ling submitted that his clients had to publish that notification because the plaintiffs' attacks and criticism of his clients in the newspapers were done with 'bad motive using dirty tactics' to serve their own 'ends' against the society and that the notification was the best way to defend the interest and protect the integrity and reputation of the executive committee. He further submitted that the words used in the notification were fair and reasonable, done in good faith and without malice.

[30] The very first thing I must do, in relation to this issue is to apply the test or ask the question formulated by Green LJ in *Watt v Longsdon* [1930] 1 KB 130 at p 153 which was applied by the Court of Appeal sitting in Kuching in the old case of *Sarawak Time Ltd & Ors v Tan Too Yam* [1960–1963] SCR 221. The test is worded this way:

> Would the great mass of right-minded men in the position of the defendant had considered it their duty, under the circumstances, to make the communication.

[31] I would have to answer that question with a 'yes' because the plaintiff have not just raised the issues of the membership application and the use of the hall at the press conference but have demanded, as shown in exhs D12(7) and D9(T1), the English translation of the news article from *United Daily News* and *See Hua Daily News*, for an explanation from the executive committee on these issues. There was therefore a duty, and a right minded person in their shoes should explain the defendants' stand on the issues raised.

[32] The next question which I must then asked myself is in responding in the like manner, ie by going to the press, have the defendants transgressed the realm of a proper reply by making 'counter-charges or unnecessary imputation' as cautioned by the learned author whom I have quoted earlier?

[33] When mulling that question, I must say that the last sentence in the notification indeed profess to do just that, I mean giving a proper reply, when it states, and I quote again:

> It is hereby announced, so as to set the record straight.

Unfortunately, the tone was not set right in the first opening paragraph of that notification because instead of just explaining that the forms were improper, the defendants accused the plaintiffs of causing 'misunderstanding', creating 'dissatisfaction' and 'hatred among villagers of Siburan'. The negative imputations of this statement on the characters of the plaintiffs in that reply is

in my view, wholly unnecessary and irrelevant to the vindication as cautioned by the learned author Gatley which have quoted earlier.

[34] Mr Chong Siew Chiang has also raised in his submission, s 12(3) of the Defamation Act 1957 which provides that in respect of the defence qualified privilege:

> (3) Nothing in this section shall be construed as protecting the publication of any blasphemous, seditious or indecent matter or of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.

[35] He submitted, relying on *DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22 that the court must distinguish between 'that which the public is interested in' which the court will not protect with 'which is in the public interest' ie for the benefit of the public which the courts would.

[36] In this case, I could not help but say that because of the press conference held by the plaintiffs, the notification was a matter which is in the public interest and this reasoning I would add is in accord with the citation by Mr Henry Ling of the number of case authorities, ie *Loveday v Sun Newspapers* (1938) 59 CLR 503, *Penton v Caldwell* (1945) 70 CLR 219 and *Harbour Radio Pty Limited v Trad* [2012] HCA 44, which acknowledged that a person under attack in public has a corresponding right to defend himself also in public. The publication of that defence in public is made in an occasion which is privilege but in the context of this case, when that defence comes outside the ambit of a proper reply as I said earlier, then I am of the view that the privilege is lost. I am moved to end a discussion on this issue with this relevant quote from what Lord Oaksey said in *Turner (otherwise Robertson) v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 which was also reproduced in Yusoff J's judgment in *Henry Wong v John Lee & Anor* [1980] 2 MLJ 254, one of the cases cited by Mr Henry Ling to me. His Lordship said:

> There is, it seems to me, an analogy between the criminal law of self-defence and a man's right to defend *himself against written or verbal attacks.* In both cases he is entitled, if he can, to defend himself effectively, and *he only loses the protection of the law if he goes beyond defence and proceeds to offence.* That is to say, the circumstances in which he defends himself, either by acts or by words, negative the malice which the law draws from violent acts or defamatory words. (Emphasis added.)

[37] Regrettably, although I must add quickly add that the anger of the defendants is understandable, they should not have gone on the offensive with their choice of words in the first paragraph of the notification.

[38] Since my decision is that the defence of qualified privilege fails, the issue

of malice in the publication is irrelevant. However, assuming that the said defence succeeds what I would say about it, ie malice would have to wait until after I have determine the defence of fair comment as malice is relevant to defeat both defences.

FAIR COMMENT

[39] Mr Chong Siew Chiang has outlined in his written submission four ingredients which the defendants must established to succeed in their defence of fair comment, following *Chok Foo Choo*'s case which he submitted they have failed to do. Since I agree with him that these four ingredients are essential to the establishment of the said defence, I must list them out in this judgment and couched in words relevant to this case, they are:

(a) that the words in the notification was on a matter of public interest;

(b) that the words in the notification were not statement of facts but comment;

(c) the facts upon which the comment was based were true; and

(d) the words in the notification were fair.

A MATTER OF PUBLIC INTEREST

[40] I have earlier on commented that the plaintiffs' press conference airing their grievances about the executive committee deserved a public reply from the defendants and I agree that it is their duty, to use their own words, 'to set the record straight'.

[41] However, whilst the public has the right to know the true facts, the defendants' freedom of speech does not extend to making scurrilous attacks against the plaintiffs. The public is not entitled to know what has been alleged against the plaintiffs in the first paragraph of that notification. In other words, the public interest element fails.

ALLEGATION OF FACTS, NOT COMMENT

[42] On this issue, I first agree with Mr Henry Ling that although two of the defendants witnesses ie Phang Nam Fatt ('DW3') and Chung Chou Dhin ('DW8') agreed in their cross-examination that para 1 of the notification were statement of facts, whether they were so is a question of law which I must answer — not the witnesses.

[43] However, following the Federal Court's decision in *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 1426 (folld) which held that the allegation of disgraceful conduct committed by the plaintiff is an allegation of fact which could only be defended by a plea of justification but not comment, I am bound to apply the same principle here to the detriment of the defendants. The words in para 1 of the notification were clearly allegation of facts made against the plaintiffs for causing dissention and inciting hatred amongst the people of Siburan against the executive committee. Justification was of course not pleaded by the defendants. What they have pleaded instead in para 12 of their amended defence was a rolled up plea in that in so far as the words complained consist of statements of facts, they were true in substance and in fact but where they consist of expression of opinion, then these were fair comments. I have earlier in an interlocutory ruling held that the said 'rolled plea' was a defence of fair comment. Thus the defendants could not escape the rigours of proving fair comment demanded by the law.

TRUE FACTS

[44] Mr Chong Siew Chiang has shown in pp 45–51 of his written submission that what was stated in para 2 of the notification were not true and what were untrue are these, said he:

(a) the membership's forms were not issued by the executive committee and did not bear its seal;

(b) the applicants voluntarily took back their RM100 membership subscription fee;

(c) the executive committee executed their administrative and financial matters according to the Rules and Constitution of the society; and

(d) Chong Jit Leong had made a misleading statement in the *International Times* dated 25 July 2010 and claimed to take legal action against the committee within seven days.

[45] I agree with Mr Chong Siew Chiang that the statements could not be true because the application forms exhibited in the plaintiff's bundle of document, bundle E, clearly show the seal of the society with the proposer and seconder from the executive committee such as Jee Nyen Chong, Voon Sam Ted, Bong Kin Seng and Thian Pian Choi (the then treasurer). What has also not been proven at the trial by the defendants were the villagers' feelings of dissatisfaction and hatred against the defendants as stated in para I of the notification. As for the voluntary taking back of the membership fees it is only half a truth because the plaintiff's witnesses, Lee Boo Hiung ('PW5') Phun

Teck Chew ('PW6') and Chang Hon Hiung testified that they were told that if they did not take back their fees, the money would be donated to a charity of the executive committee's choice.

[46] In respect of the third statement, I am not convinced that the executive committee did not follow the rules and regulation of the society as submitted by Mr Chong Siew Chiang. They have, I agree taken their time to consider the application for the new membership although r 3(b) provides the secretary must forward the application to the executive committee 'at the first convenient opportunity' but it did not say that the approval must be prompt and the discretionary power to reject the application is given to them without having to assign any reason as stated in the said rule.

[47] As for the use of the hall by Democratic Action Party ('DAP') which was rejected which shows, said Mr Chong Siew Chiang that the use of the hall was not open to all and was a discriminatory exercise of power by the executive committee, the rejection was satisfactorily explained by Phang Nam Fatt ('DW3') who was a vice-treasurer of the society at that material time. He testified that when Phun Teck Chew made the application to use the hall, he said it was to hold a birthday party for his mother but later Voon Sam Ted found out that it was to hold DAP's dinner to celebrate the formation of its Mambong branch. At any rate, this rejection is immaterial and irrelevant because it was an event which happened in September/October 2011, way after the notification had been published, Mr Chong Siew Chiang himself has submitted, based on, inter alia, *Cohen v Daily Telegraph Ltd* [1968] 2 All ER 407 that subsequent events or knowledge of the facts are not admissible to support the plea of fair comment and I wish to add, nor to defeat it. It is the conduct of the parties at that material time which the court must consider, not one which is too for remove from it both in time and sequence of events.

[48] However, the falsity of the other two earlier statements are sufficient in my view, to defeat the defence of fair comment and after saying this I must mention that the citation of *Kemsley v Foot* [1952] AC 345 by Mr Henry Ling to support his contention that even if one fact was proved to support the comment but not the others, the said defence still could succeed, cannot be applied in this case. The simple reason is when Lord Porter made that statement at p 357 of the report, His Lordship was dealing with facts not found in the alleged libel '*but in particulars delivered in the course of action*'. (Emphasis added.) Lord Tucker made the same observation at p 362 of the report that 'where the facts relied on to justify the comment are contained only in *particulars*, it is not incumbent on the defendant to prove the truth of every fact so stated in order to establish his plea of fair comment …'. (Emphasis added.)

[49] I would conclude this issue by lifting the same quote made by Lord

Parker from the judgment of Kennedy J in *Joynt v Cycle Trade Publishing Co* [1904] 2 KB 292 at p 294 that 'a comment cannot be fair which is built up on facts which are not truly stated'.

[50] As I have promised earlier in the judgment and despite the failure of the defences of qualified privilege and fair comment, I would now consider whether there was malice on the part of the defendants in drawing up and publishing the notification. Malice, of course is only necessary to be proved if the two defences have been successfully raised by the defendants.

MALICE

[51] Mr Chong Siew Chiang in his written submission has potrayed the defendants as desperados (my word, not his) who wanted to cling to power, afraid that the influx of new members would dethrone them from their seats of power (my words again, not his). Their motive in publishing the notification, said he was to 'injure the plaintiffs' reputation for the purpose of attaining their private and selfish gain', that 'gain' being the power to manage the society and control the use of the hall. For added measure, he further submitted that the calling of 21 witnesses by the defendants and the lengthy trial of 30 days are further proof of the defendants' desire to 'blacken the plaintiffs' character'.

[52] Mr Henry Ling, on the other hand, highlighted the evidence of both Chung Chou Sin ('DW8') and Voon Sam Ted that the notification was made honestly and in good faith to answer the 'hostile criticisms' made by the plaintiffs against the executive committee. He cited the case of *Joseph v Spiller* [2010] 3 WLR 1791, a decision of the Supreme Court of England in which Their Lordships advocated that the defence of fair comment be renamed 'honest comment' and for the proof of 'public interest' in that defence be dropped.

[53] Though I have decided to consider this issue of malice to demolish both the defences of qualified privilege and fair comment, I am aware that malice for one is not the same as malice for the other. Unlike in a defence of qualified privilege, for malice in fair comment, the plaintiffs need not prove motive for the publication and 'all that mattered was whether or not the commentator believed in the truth of his comment' (per Lord Phillips in *Joseph*'s case at p 1812).

[54] When raised in a defence of qualified privilege, malice can be defeated said Lord Nicholls in *Albert Cheng & Lam Yuk Wah v Tse Wai Chun Paul* [2000] 3 HKCCFAR 339 at p 361, 'by proof that the defendant used the occasion for

some purpose other than that for which the occasion was privileged'. What I am about to say next would cover both the motive (or the absence of it) and the honesty in making the notification.

[55] Whilst I totally agree with Mr Chong Siew Chiang that this has been a long drawn trial and not only now when I laboured over this judgment but more so then during the trial, wished that it was over in a week, I cannot adversely comment on the defendants need to call so many witnesses as I would, also their need to publish the notification.

[56] The executive committee was under siege. Their management of the society has been questioned in the press conference. Their right to the freedom of speech allowed them to make a rebuttal using the same channel as the attack launched against them by the plaintiffs, ie in the newspapers. I do not, for a second, doubt their honest belief in making that rebuttal nor do I see their conduct in doing so as an expression of ill-will against the plaintiffs. Lord Nicholls in *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127 at p 201 has a good line to describe such a right and it is that:

> Freedom of speech does not embrace the freedom to make defamatory statements out of personal spite or without having a positive belief in their truth

[57] I would think that in this case there is the absence of the former, personal spite and the presence of the latter, that is positive belief in the truth of the statement that is in so far as proof of malice is concerned.

[58] However, since I have decided that the twin defences have failed, below is my assessment of the damages.

DAMAGES FOR LIU THIAN LEONG

[59] He is the more prominent of the three plaintiffs, actively involved in the management of five private limited companies and various associations be it political, social and educational in his village and in the Kuching-Saramahan Division. I do not wish to list them all out but Mr Chong Siew Chiang has reproduced them in p 68 of his written submission and has submitted that the sum of RM100,000 should be compensation for the defamation. But, in considering the quantum I must not be guided solely by his standing in society but the extent of the publication as well which undisputedly was only carried by two local Chinese newspapers and with respect, would be generating interest primarily within the people of Siburan. This last consideration holds true not just for him but the other plaintiffs as well. Further, though active in all the six organisations listed by his counsel, the majority of these organisation are localised in the said area, not state or nation wide. Further more, the sting

of the accusation in para 1 of the notification was not so grave and serious as, for example, to be accused of a criminal offence such as murder or robbery. Again this consideration applies to the other two plaintiffs too. With all these considerations in mind, I am of the view that damages of RM60,000. be sufficient to compensate Liu Thian Leong for his injured feelings and reputation following the notification.

DAMAGES FOR CHONG JIT LEONG

[60] Chong Jit Leong held various positions in six organisations, mostly in Siburan and had a trading company there as well. Again these organisation are listed in Mr Chong Siew Chiang's written submission at p 59. I would consider, as fair, a compensation of RM40,000 for him although his counsel submitted the sum of RM80,000.

DAMAGES FOR CHANG HON HIUNG

[61] Chang Hon Hiung was a director of a limited company and proprietor of two trading companies and involved in two organisations in Serian and Siburan. His counsel has submitted that a sum of RM80,000 be awarded to him but which would not be fair in the light of the scaled down awards handed to the earlier plaintiffs since his socio-economic standing is lesser than that of Liu Thian Leong. I would award the same compensation to him as Chong Jit Leong which is RM40,000.

[62] The defendants are therefore jointly and severally liable for the damages assessed and all the above awards are attached with the statutory interest at the rate of 5%pa from the date of this judgment until full settlement.

PERSONAL/OFFICIAL CAPACITIES OF THE DEFENDANTS

[63] I have made a fleeting mention of this one last issue at the beginning of this judgment. Mr Henry Ling has submitted that the defendants could only be sued and be found liable in their official capacities as executive committee members but not in their personal capacities. He cited s 9(c) of the Societies Act 1966 which provides that a society registered under the Act can sue and be sued in the name of its office-bearers. I have earlier at the interlocutory stage of the proceedings declined to determine if the defendants should have been just sued in their official capacities, holding that the issue must be decided only at the conclusion of the trial.

[64] Having heard the evidence, I am inclined to follow the decision of Stephen Chung JC (as His Lordship then was) in *Ling Kiong Tieng @ Ling Hie Sing v Wong Lieng Kiong & Ors* [2010] MLJU 1445; [2010] 1 LNS 1759 that

the defendants should not be made personally liable for the defamatory statement in the notification as right from the start the decision to publish it was a joint decision of the executive committee after Chang Chou Shin ('DW8') raised it with them. Though the notification was drafted by Voon Sam Ted, the executive committee met and agreed with the draft — again it was a collective decision which in my view exonerated the defendants personally. Thus, my decision on the liability and the compensation to be paid are to be read in the light of the finding above.

COSTS

[65] Mr Chong Siew Chiang submitted that the plaintiffs be entitled and the court should issue a certificate of costs for two counsel, given he said, the length of the trial and number of witnesses. With respect I cannot agree for this is in essence, a straight forward and simple libel action as Mr Chong Siew Chiang himself has labelled it. Though the defendants witnesses were so many, most of them did not have to stay in the witness stand for too long — the newspaper reporter, the editor of the newspaper, the translators of the articles, the mother and friend of the deceased basketballer and the three applicants, for example. Further, the cross-examination of the main witnesses such as the first and third defendants took a long time in itself. The other consideration is that the damages assessed is way below the jurisdiction of the High Court. Thus, I would in the given circumstances, fix cost collectively for all three actions at RM40,000.

Claims allowed and first plaintiff awarded RM60,000 and second and third plaintiffs awarded RM40,000 each in damages.

Reported by Ashok Kumar